UNITED NATIONS

General Assembly

FORTY-EIGHTH SESSION

Official Records

SIXTH COMMITTEE
27th meeting
held on
Thursday, 4 November 1993
at 3 p.m.
New York

SUMMARY RECORD OF THE 27th MEETING

Chairman: Mrs. FLORES (Uruguay)

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AGENDA ITEM 143: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FIFTH SESSION (continued)

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Distr. GENERAL
A/C.6/48/SR.27
10 December 1993
ENGLISH
ORIGINAL: FRENCH

93-82139 (E)

The meeting was called to order at 3.20 p.m.

AGENDA ITEM 143: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FIFTH SESSION (continued) (A/48/10, 303, and A/48/170-S/25801)

1. Mr. CIZEK (Czech Republic), referring to the question of international liability for injurious consequences arising out of acts not prohibited by international law, said that the International Law Commission, by deciding, despite the contrary view of some of its members, to proceed in stages and to examine the question of prevention before that of remedial measures, had reduced the scope of the problems to be resolved without abandoning the original idea of a study of liability. His delegation agreed with the general orientation of the Special Rapporteur's ninth report. As the Special Rapporteur had said, the obligation of prevention was one of "due diligence", and it should not be confused with the obligation to prevent the occurrence of harm, which would shift the entire problem towards the area of responsibility for wrongful acts. On the other hand, it would be premature to conclude at the current stage of discussion that the fact that a State had met its obligations in the field of prevention excluded entirely its liability for possible harm.

2. Concerning the law of the non-navigational uses of international watercourses, his delegation believed that the time had come to decide what form the final product of the Commission's work should take. A framework convention would have the advantage of being a legally binding instrument, but it would also risk being ratified by only a small number of States, as had already occurred in the case of some other codification conventions. Its real function once it entered into force could also be questioned. In situations concerning international watercourses regulated by multilateral treaties between the States concerned, a new framework convention could be applied only to issues not regulated by those instruments. Moreover, it would be applied only between the States which had become parties to it. Thus, it would not play a more significant role than model rules, at least as far as its material provisions were concerned. Ratification by an insufficient number of States could also undermine the authority of the rules embodied in it. On the other hand, model rules, although not formally binding on States, could have moral and political influence on their behaviour that would be no less significant than that of a framework convention. Procedures for their adoption would be considerably simpler and faster. The non-binding form of the model rules would also enable the inclusion of more specific provisions answering some urgent problems arising in the field. Model rules, however, could not guarantee the binding character of procedural mechanisms proposed in the draft articles.

3. The provisions on dispute settlement should be drafted with due regard to the specific characteristics of non-navigational uses of watercourses. They should provide for compulsory fact-finding procedures or conciliation.

4. The substantial redrafting of article 7 proposed by the Special Rapporteur deserved careful study. In its current form, the obligation of watercourse States not to cause significant harm to other watercourse States was absolute. The question could arise whether that obligation was superior to the principle of equitable and reasonable utilization of a watercourse, whatever the

(Mr. Cizek, Czech Republic)

proportion of the benefits of reasonable utilization compared to the extent of harm.

5. His delegation supported the proposal to include two new items in the Commission's agenda, namely "State succession and its impact on the nationality of natural and legal persons" and "The law and practice relating to reservations to treaties". It would be useful to consider the possibility of producing a report on the recent practice of States concerning nationality in the context of State succession. His country was ready to provide the Commission with all necessary information on its own recent experience in that area.

6. Mr. SZENASI (Hungary) said that his delegation attached particular importance to the question of international liability for injurious consequences arising out of acts not prohibited by international law, and took note of the modest progress made on that subject by the Commission at its forty-fifth session. In the hope that the Sixth Committee would be able to engage in a substantive discussion on a set of articles at its next session, his delegation would refrain from making any comment at the current stage.

7. Concerning Part Two of the draft articles on State responsibility, his delegation welcomed the separate handling of the cessation of wrongful conduct and reparation. Article 6 was intended to safeguard the physical conditions allowing effective reparation in the form of restitution in kind, which would be highly improbable if the State committing the wrongful acts were allowed to continue towards its objective. The aim of article 6 bis was to eliminate all the consequences of the illegal act and to re-establish the situation which would in all probability have existed if the act had not been committed. His delegation shared the objections raised by other delegations to the exception contained in article 7, subparagraph (d), as it appeared to be more political than legal. It considered the remaining draft articles, especially article 10 bis on assurances and guarantees of non-repetition, to be important and fully justified. The future convention on State responsibility should contain a procedure for the settlement of disputes arising out of its interpretation or application, and such a procedure should not be limited to the area of countermeasures. His delegation favoured a compulsory third party settlement procedure. Such provisions, however, should be kept within the limits of the basic rules of international law in order not to compromise the possibility of universal adherence to the future convention.

8. Concerning the law of the non-navigational uses of international watercourses, his delegation confirmed its preference for a framework convention over model rules and supported the latest draft articles submitted by the Commission. It also agreed with the opinion that a dispute settlement system should be envisaged in the context of the draft articles, whose value would be significantly enhanced if they were supplemented with a fact-finding mechanism.

9. With regard to the long-term programme of work of the Commission, his delegation had no objection to the inclusion of two additional topics, namely, "State succession and its impact on the nationality of natural and legal persons" and "The law and practice relating to reservations to treaties".

10. Mr. BLOOM (United States of America), referring to the topic of State responsibility, said that his Government would not be able to reach a final judgement until the project had progressed further and it could evaluate all of its elements. At the current juncture, however, it had a number of concerns.

11. On the question of dispute settlement, his Government strongly endorsed the principle of choice. At the time of signing, ratifying or acceding to a treaty, States should be given the opportunity to declare whether they agreed to be bound by any dispute settlement provisions and should be accorded the right to withdraw or modify such a declaration. It was also important to avoid a system that was overly complex, too rigid, too cumbersome or too costly. It did not seem advisable, in the context of preparing draft articles on State responsibility, to attempt to create entirely new dispute settlement mechanisms. Rather, the Commission should take into account the various permanent and ad hoc mechanisms which had already been developed. Providing for recourse to the basic existing mechanisms - conciliation, arbitration and recourse to the International Court of Justice - would be acceptable, as long as States had the option of determining the type of mechanisms they accepted and for which types of disputes.

12. The realistic goal should be to treat the subject as simply as possible in order to develop a regime which would encourage States to settle their disputes in an expeditious and peaceful manner. In that context, the attempt to establish a third-party settlement procedure dealing with countermeasures was overambitious, given the current state of international law. In addition, when contemplating countermeasures the starting-point must be that they were the means by which an injured State could bring about the cessation of a wrongful act, or the conclusion of an agreement to resolve a dispute peacefully. Placing excessive burdens on the injured State would only strengthen the position of the wrongdoing State. Requiring, for example, the exhaustion of all other methods of dispute settlement was to misunderstand the important role of countermeasures in inducing States to settle their disputes by agreement.

13. With regard to article 1, paragraph 2, the commentary should note that where the breach was a completed act and compensation had been paid, there was no obligation of performance since that would amount to double compensation.

14. With respect to articles 6 and 6 bis, his delegation generally agreed with them and with the related commentary. In that connection, it was to be regretted that one delegation had felt the need to disrupt the Committee's discussion on those articles by making polemical and irrelevant remarks which were both legally and factually inaccurate.

15. The structure of articles 7 and 8 and the relationship between them called for certain reservations. The purpose of the articles was to set forth the rule that the injured party should be made whole. Making "restitution in kind", a form of reparation that was inherently rare, the norm, and making the more usual remedy of compensation a subsidiary remedy might involve a process of analysis that was too rigid. The Commission might wish to reconsider the question.

16. Concerning article 7, subparagraph (d), paragraph (17), of the commentary, made a distinction between lawful and unlawful nationalizations. His delegation did not support that distinction, which it considered to be pointless. Its

(Mr. Bloom, United States)

origin related to restitution in kind, a remedy too unlikely to justify a distinction which could otherwise lead to confusion and misconceptions.

17. With respect to article 8, his delegation was concerned by the suggestion in the commentary that compensation should not be limited to damage directly or proximately caused by the wrongful act and that while compensation should follow the full course of the causal chain, if there were a series of concomitant causes, damages should be payable only in proportion to the amount of injury attributable to the wrongful act and its effect. That seemed to be a radical departure from the settled rule and the desirability and practicality of such a departure might be questioned. According to various theories of causation, an event might have an endless stream of consequences and there was no objective way of determining what proportion of each consequence was caused by other factors. Limiting compensation to directly or proximately caused damage, while admittedly also subjective, made it clear that compensation should not be given where the consequence was remote or an independent intervening factor had also contributed to the damage.

18. His delegation endorsed article 8, paragraph 2, with the exception of the treatment of the recovery of interest and lost profit, and it disagreed strongly with the use of the words "where appropriate". When compensation for the injured party required the payment of interest, lost profit or both, it must be paid. Clearly, neither article 8, paragraph 2, nor any other article justified or called for the payment of double compensation for the same loss. By including the words "where appropriate" in article 8, paragraph 2, the impression might be given that in other articles double compensation might be appropriate. Furthermore, the fact that article 8 provided that compensation should cover any economically assessable damage, including moral damage, should not imply that compensation for moral damage was other than exceedingly rare and all but impossible to quantify.

19. Article 10 dealt with a remedy that was extremely rare and for which there were relatively few modern precedents, in particular in support of paragraph 2 (c). Paragraph 2 (d) was also problematic. While it was certainly true that a State could incur liability because it had not punished officials guilty of serious misconduct, that did not mean that a State could be required, by a third party or otherwise, to punish those responsible. Precedents on that point were very rare and from another era. Indeed the entire article should be considered further.

20. Likewise, his delegation wondered why article 10 bis was necessary and whether its basis was not more political than legal. Lastly, it associated itself with the delegations which had objected to the notion of "crimes of States". It noted that consideration was being given to including the consequences of international "crimes" of States in Part Two. The Commission would thus have the opportunity to reconsider the wisdom of article 19 of Part One. For the United States, that article was not only devoid of support in State practice but was conceptually wrong. The extent of the problems it posed was underlined by the fact that many of the examples cited were completely out of date.

(Mr. Bloom, United States)

21. Even if that approach was substantiated by practice and was not conceptually wrong, it would create enormous problems for Part Two. One certainly undesirable result would be to denigrate unduly the consequences of erga omnes breaches in general. Other problems caused by the statement of the consequences of article 19 of Part One were touched upon in the reports of the Special Rapporteur. If the Commission did not abandon the chimera of "international crimes of States", it would be unlikely to complete its work on Part Two and its first reading of the entire draft on State responsibility during the current term of its members, and in addition the results of its work would be accepted by far fewer States. Important work was being done in the field of the criminal responsibility of individuals and the time was ripe for a reappraisal of the idea of "crimes of States".

22. With regard to the law of the non-navigational uses of international watercourses, his delegation was pleased to note that the Commission had undertaken to take another look at draft article 7 and its relationship with draft article 5. At a time when needs for finite resources were increasing rapidly it was crucial to demand the equitable and optimal utilization of those resources. It was important that a simplistic identification of one key element of "equitable" should not be allowed to distort the entire regime of the draft. Some delegations had suggested deleting draft article 7, which his delegation might find acceptable if it was combined with a clear record leaving no doubt that the deletion was solely because the question of harm was an indispensable component of the notion of "equitable". If draft article 7 was left as it was, it might have the effect, inter alia, of giving an undue advantage to the prior-in-time user and it should therefore be amended to avoid running the risk of cancelling the effect of article 5. The proposal put forward by the Special Rapporteur in his first report was one plausible way to avoid allowing article 7 to destroy the function of article 5.

23. The idea of including unrelated confined groundwater intrigued his delegation. It looked forward to the Commission's decision on the matter and for the moment noted that most hydrologists would support a unified approach that would treat confined underground waters in the same way as an above-ground lake. It did not seem particularly efficient to do in two steps what could be done in one, namely, prepare one draft excluding unrelated confined groundwater and then another applying the same principles to such confined groundwater.

24. With respect to liability for injurious consequences arising out of acts not prohibited by international law, his delegation again urged the Commission to concentrate its efforts on principles relating to actual harm incurred from ultrahazardous activity. It was pleased to note that that idea seemed to be gaining favour. A more expansive scope was unlikely to achieve widespread acceptance. The regime to be established must have as its object the promotion of international cooperation and negotiation. To that end, the articles should take the form of principles rather than a framework convention. In that context, it was regrettable that the revised articles introduced in the ninth report of the Special Rapporteur went beyond the concept of general principles by imposing detailed obligations regarding the assessment of the impact of activities, consultations, negotiations and dispute settlement procedures.

(Mr. Bloom, United States)

25. Specifically, his delegation questioned the appropriateness of attempts to draft articles intended for inclusion in a convention designed to cover all nature of activities. Liability regimes might well differ with respect to the nature of the activity in question or the level of hazard. Additionally, for some purely private activities, the concept of State liability was inapt. An attempt to deal with all contingencies could lead to an indecipherable mosaic of rules. Moreover, the Commission would be in danger of going beyond its mandate, as well as its technical competence, if it sought to develop a specific list of activities which might be incorporated in a draft convention. Inclusion of subjects such as dangerous genetically altered microorganisms, for example, would introduce policy debates that went well beyond the scope of draft legal articles. His delegation therefore favoured narrowing the scope of the topic. The imposition of liability for activities involving "appreciable risk" made the topic virtually unmanageable. Moreover, it extended potential liability far beyond that currently recognized by international law or any existing convention.

26. The United States supported the proposition that operators engaged in an activity should be liable for the harm that might result therefrom.

27. Finally, with respect to the long-term programme of work of the Commission, his delegation was of the view that the two topics the Commission was proposing to include in its long-term programme of work, namely "the law and practice relating to reservations to treaties" and "State succession and its impact on the nationality of natural and legal persons" deserved the full attention of the international community. They were matters of immediate and practical significance. In particular, international practice since the adoption of the Vienna Convention on the Law of Treaties had shown that the issue of reservations posed problems that were not addressed in that Convention. It would therefore be useful for the Commission to develop rules that would clarify the law in that area.

28. Mr. PASTOR RIDRUEJO (Spain) said that the difficulty of "international liability for injurious consequences arising out of acts not prohibited by international law" was that it was a relatively new topic which raised controversial theoretical questions, in particular that of demarcation between primary and secondary rules. In that respect, his delegation was not convinced that the activities in question were prohibited by the primary rules of international law. He therefore felt that the Commission should consider changing the wording of the topic. That aside, he could only welcome the pragmatic approach of the Special Rapporteur in his most recent reports which, with respect to the prevention of transboundary harm, based a State's responsibility on respect of the concept of "due diligence". The question of reparation would nevertheless have to be addressed, since the articles on prevention of transboundary harm were far from exhausting the subject.

29. With respect to the law of the non-navigational uses of international watercourses, he wondered what precise function the future instrument was meant to perform. Article 1 gave the impression that the rules should be applied unconditionally and automatically; however, the first paragraph of article 3 made the application of the rules subject to the conclusion of special agreements between the watercourse States. The Commission should remove the

(Mr. Pastor Ridruejo, Spain)

ambiguity: the instrument in question should indeed be applicable even in the absence of special agreements.

30. Regarding the question of whether the draft should take the form of a framework convention or model rules, his delegation was in favour of a framework convention; the adoption of model rules should be considered only if it proved impossible to agree on a convention which was acceptable to all.

31. In addressing the crucial topic of dispute settlement, account should be taken of the particular situation of each international watercourse and of existing methods of settlements. The system adopted should therefore be extremely flexible and give particular prominence to the fact-finding mechanism.

32. Turning to article 7 of the draft, he emphasized the extreme ambiguity of the term "appreciable", and proposed replacing it in all the articles in which it appeared by "considerable" or "significant". Bearing that reservation in mind, his delegation endorsed the new wording of article 7, at least in its English and French versions, which provided a satisfactory balance between the interests of the upstream States and those of the downstream States. Furthermore, he was of the view that the topic of confined groundwaters should be dealt with in the draft articles.

33. Finally, with respect to the new topics that the Commission was proposing to include in its long-term programme of work, namely "the law and practice relating to reservations to treaties" and "state succession and its impact on the nationality of natural and legal persons", there was ample justification for the proposal of the Commission. However, consideration of the former topic should not call into question certain articles of such instruments as the 1969 Vienna Convention on the Law of Treaties. With respect to the latter topic, he recalled that the international community had already provided itself with two relevant instruments - the 1978 Vienna Convention on Succession of States in respect of Treaties and the 1983 Vienna Convention on Succession of States in respect of State property, Archives and Debts. Since neither treaty had been ratified by a sufficient number of States, they had remained without effect; the international community should therefore resume its codification efforts in that field. On several occasions, Spain had proposed the reconsideration of certain conventions on the codification and development of international law which, having failed to gain general acceptance, had never entered into force.

34. Mr. THEUERMANN (Austria), referring to chapter II of the report of the International Law Commission, said that Austria attached great importance to the elaboration of a draft statute for an international criminal court which concerned one of the most difficult areas in international law, namely the establishment of individual accountability at the international level. The lack of a sanctions system to be applied effectively against individuals who had perpetrated very serious international crimes was a serious shortcoming in the current international legal order.

35. Recent, and indeed current events, for example in the former Yugoslavia, had highlighted that lacuna. The rapid response of the international community in establishing, by way of a Security Council resolution, an ad hoc tribunal to

(Mr. Theuermann, Austria)

prosecute persons responsible for war crimes committed in the former Yugoslavia had certainly acted as a catalyst and given a decisive impetus to the work of the International Law Commission on that question. Although it was working for the establishment of a permanent judicial system, the Commission had already learned the relevant lessons and would continue to benefit from the experience gained from the ad hoc international tribunal on war crimes in the former Yugoslavia.

36. As it had already stated, Austria favoured the speedy elaboration of an international judicial system irrespective of the progress achieved on the draft code of crimes against the peace and security of mankind. Since the two questions were now separate, the way was paved for the establishment of a self-contained judicial system which could become operative in the near future on the basis of an international instrument.

37. With respect to the draft articles, article 2 contained two alternatives for the relationship of the tribunal to the United Nations. However desirable it might be to institute the tribunal as a judicial organ of the United Nations, that option seemed somewhat unrealistic in view of the difficulties an amendment to the Charter would necessarily entail. An interesting proposal had been made in that respect to make the tribunal a subsidiary organ of the International Court of Justice.

38. The provisions of the draft statute concerning jurisdiction and applicable law were broadly satisfactory; however, the list of crimes defined by treaties as enumerated in article 22 might be supplemented by the crimes referred to in the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

39. Article 26 laid down a second strand of jurisdiction in respect of other international crimes not covered by article 22, and introduced a special procedure for acceptance of jurisdiction by States. Although his delegation shared the underlying reasoning of the working group that, ratione materiae, such serious crimes as aggression and genocide, in the case of States not parties to the Genocide Convention, should somehow be included under the court's jurisdiction, his delegation doubted whether the formula chosen in article 26 (2) (a) was the best and simplest solution. It would be difficult to dispel uncertainties in the interpretation of that important provision.

40. With reference to article 23, his delegation had a clear preference for alternative B providing for an opting out system whereby, in principle, States would automatically confer on the court jurisdiction over the crimes listed in article 22.

41. With regard to article 24, paragraph 2, the double condition provided for the acceptance of the court's jurisdiction ratione personae seemed to weaken the effectiveness of the judicial system in cases where either of the States concerned refused to agree to its jurisdiction.

42. Addressing the question of international liability for injurious consequences arising out of acts not prohibited by international law, he said that his delegation was still not convinced that the International Law

(Mr. Theuermann, Austria)

Commission had yet mastered the basic concept of "risk of transboundary harm" which should underlie the draft. A division of opinions in that respect still seemed to prevail. Another conceptual difficulty appeared when it came to drawing a firm line between State responsibility and liability. It was to be hoped that the Commission would be able to surmount those difficulties.

43. Addressing the issue of State responsibility, and, more specifically, the new articles provisionally adopted by the Commission, he noted that on article 6, the Commission had identified a divergence of views on whether a "cessation" was a primary or secondary obligation. Its decision to include nevertheless an appropriate provision in the secondary rules was, on pragmatic grounds, justified, as the example in paragraph 10 of the commentary on article 6 indicated. In principle, the text did not give rise to observations, but the absence of a provision regarding final decisions of supreme courts were concerned, gave rise to some reservations.

44. With regard to article 6 bis, paragraph 2, the reintroduction of the element of fault in determining reparation was certainly necessary. However, none of the difficulties which had led the Commission to abandon the element of fault in Part One of its draft was discussed in the report, and it was difficult to understand why what was inappropriate in Part One should be appropriate in Part Two.

45. With regard to article 6 bis, paragraph 3, he noted that the commentary mentioned the opposition to that proposition. However, one pertinent case was not addressed in the commentary, namely the final judgement of a supreme court. In a State based on the rule of law, where courts were totally independent, there was sometimes no legal remedy available for rescinding a judgement of a supreme court. The author State could only offer substitutes (like a pardon in criminal cases or compensation in civil cases). The commentary, in paragraph 15, which intended to justify the proposition, was not convincing. To avoid forcing an author State into a violation of article 6 bis, paragraphs 1 and 3, provision should be made for that situation, and it was doubtful whether it was covered by article 7 (c).

46. The crucial part of article 7 was paragraph (c), which currently lacked precise definitions required value judgements for its implementation. As long as the matter was dealt with by a third-party procedure, the formulations might be tolerable. But although the International Law Commission intended to set up third-party procedures in Part Three of the draft, the present law of reservations, in conjunction with the Genocide Opinion of the International Court of Justice, would not prevent a party to the future convention from excluding Part Three when ratifying or adhering. Paragraph (c) should therefore be formulated in a way that might be applied between States in the absence of third-party intervention.

47. The remarks he had made regarding article 7 also applied to article 8. The Commission cited difficulties in not achieving a more precise formulation in respect of "interests" and "lucrum cessans". The same difficulties, would, however, exist in any third-party settlement procedure, and, even more so if that procedure was not available.

(Mr. Theuermann, Austria)

48. With regard to article 10, paragraph 2 (b) and (c), he noted that the text seemed to provide for monetary compensation of immaterial damage and for punitive damages. That would be an innovation which could hardly be called progressive development, since in the past international courts and tribunals had always refused to award such damages. It was striking that the commentary, which otherwise relied heavily on antiquated and sometimes even outdated cases and literature, did not discuss the aforementioned instances, but invoked only the Rainbow Warrior case. It could hardly be argued that that single instance of, moreover, particular aspects should have transformed customary international law.

49. In article 10, paragraph 2 (d), once again, the single reference was to the Rainbow Warrior case. Moreover, the text put a State based on the rule of law again in an awkward position. Such a State could not, in good faith, accept an obligation to "punish officials or private parties" for serious misconduct or criminal conduct, since it was up to independent courts to decide whether anyone should be "punished".

50. Article 10 bis appeared expendable, since what it prescribed was already covered by article 1, paragraph 2, which required the author State "to perform the obligation it had breached"; performing it effectively included the necessary adaptation of domestic laws or administrative measures if they had been instrumental in causing the breach. A similar effect was achieved by article 6. Moreover, to request a State to give "assurances or guarantees" that it would in future fulfil an obligation which it was already bound in law to fulfil seemed incongruous.

51. Turning to the fifth report of the Special Rapporteur, he said that he wished to make a few observations on the question of dispute settlement procedures. In the view of his delegation, the approach chosen by the Special Rapporteur and the Commission was a realistic one. Clearly, an ideal solution would be to subject the whole of the law of responsibility and, indirectly, the evaluation of compliance with all the substantive rules to an international arbitral or judicial body. The Special Rapporteur and the Commission had, however, settled for a procedure which subjected to legal controls only the State which resorted to unilateral measures. That system was certainly preferable. In the "ideal" solution, a State whose rights were violated would have to wait for a long time before redress became available. The present solution provided redress in the form of countermeasures, and had the additional advantage of urging the author of the violation into third-party settlement procedures if it wished to avoid the countermeasures. The possibility of judicial review should, on the other hand, deter States from applying countermeasures rashly. The proposition thus removed some of the weaknesses of Article 33 of the Charter, and should be supported.

52. Caution was nevertheless indicated. As stated before, the possibility that States might become parties to the Convention while making reservations concerning Part Three could not be excluded. Whether the optimism of the Special Rapporteur was justified remained to be seen. Provisions in Parts One and Two of the draft should therefore be formulated in a way that their application was not solely dependent on a third-party settlement procedure.

(Mr. Theuermann, Austria)

53. The proposed three-step approach of conciliation, arbitration and reference to the International Court of Justice - which could even act as a review instance in the case of excès de pouvoir by the arbitral tribunal - was ingenious in theory but cumbersome in practice. Thought should be given to streamlining it. Perhaps the experience gained in implementing the European Convention for the Peaceful Settlement of Disputes, which also had a complex structure, might provide some indications in that regard.

54. With respect to the law of the non-navigational uses of international watercourses, the Chairman of the Commission has raised two issues in his introductory statement on the Commission's report. On the first, the nature of the instrument to be prepared, Austria, like the majority of the members, preferred a framework convention. On the second, as to whether dispute settlement procedures ought to be envisaged, Austria agreed with the Special Rapporteur that they should. However, with regard to the limit on the tolerable adverse effects of the use of an international watercourse, it preferred retaining the word "appreciable" in article 3.

55. Lastly, his delegation thought that the General Assembly should approve the inclusion in the Commission's agenda of the two topics proposed: "The law and practice relating to reservations to treaties" and "State succession and its impact on the nationality of natural and legal persons".

56. Mrs. KUPCHYNA (Belarus) welcomed the progress the Commission had made in its consideration of the topic of State responsibility. The future convention should establish a dispute settlement regime providing for third-party settlement procedures and preferably taking the form of a fairly flexible mechanism within which binding procedures would play a limited role. In its future work on that issue, the Commission should provide for a regime governing any dispute that might arise from the interpretation or enforcement of the draft articles on State responsibility as a whole. Determination of the lawfulness of countermeasures, which were a rather rare phenomenon in international law, should be dealt with in a separate regime.

57. Because it was still suffering the tragic consequences of the Chernobyl disaster, Belarus took a very particular interest in the Commission's work on international liability for injurious consequences arising out of acts not prohibited by international law. Her delegation supported the principle of prior authorization of any activities presenting a risk of transboundary harm, laid down in the new article 11. However, in its view, the expression "territorial State" in article 12 should be clarified. She welcomed the Commission's intention to devote further study to the polluter-pays principle and thought that the relevant legal regime should be based not on the liability of the State but on that of the operator.

58. Her delegation was pleased to note that the Commission had been able to make some headway at its forty-fifth session on the law of the non-navigational uses of international watercourses. Like many other delegations, it believed that the final product of the Commission's work should take the form of a framework agreement. The draft articles under consideration had all the qualities and characteristics of a framework agreement. Her delegation was favourable to the idea of including specific provisions on fact-finding and

(Mrs. Kupchyna, Belarus)

dispute settlement. It also endorsed the Commission's recommendation whereby a final decision on the draft articles should be deferred until commentaries were provided for those articles, which should happen at its next session.

59. Her delegation supported the inclusion in the Commission's agenda of the two new topics entitled "The law and practice relating to reservations to treaties" and "State succession and its impact on the nationality of natural and legal persons", which were eminently topical for the members of the Commonwealth of Independent States.

60. Mr. GOMEZ ROBLEDO (Mexico) said that State responsibility was undoubtedly one of the most complex topics of international law. That was why it was important not to make the Commission's task any harder by encumbering the draft articles with irrelevant elements such as the provisions on countermeasures. Mexico believed that legitimizing the imposition of unilateral sanctions by one or more States in response to the wrongful conduct of another State was contrary to the norms of international law and might exacerbate international conflicts. All provisions on countermeasures should be deleted.

61. On the other hand, Mexico thought that including dispute settlement mechanisms in the draft articles was indispensable, even though the system proposed in the report would be difficult to enforce in practice. Establishing long and costly mechanisms that would be triggered only after resort to countermeasures and whose sole purpose was to determine lawfulness did nothing to resolve the basic problem: how to judge the lawfulness of a countermeasure without addressing the object and origin of the dispute.

62. Furthermore, the proposed system did not provide for the reparation of the damage, even though that was an essential aspect of international responsibility. If, before they could address the question of reparation, the States concerned had to wait until the lawfulness of the countermeasures had been established and the conduct that had motivated them had been judged unlawful, then, rather than inspiring confidence, the system might only prolong disputes. It was therefore essential that the settlement mechanism should provide for a comprehensive solution of the problem.

63. Turning to international liability for injurious consequences arising out of acts not prohibited by international law, he said that he would shortly circulate a study by an eminent Mexican jurist to the members of the Committee in the near future. The Mexican Government intended by that gesture to assist the Commission in its work and to lend its support in attaining the goals of the United Nations Decade of International Law.

64. With respect to the topic dealt with in chapter V of the report, namely, the law of the non-navigational uses of international watercourses, it was first necessary to decide on the form of the final document. Some countries favoured a framework agreement, while others advocated the adoption of model rules. The latter explained their preference by citing the problems involved in domestic ratification procedures. In the view of his delegation, type of instrument selected was not as important as its contents. Whatever its form, an instrument that truly reflected the needs of the international community would receive the

(Mr. Gomez Robledo, Mexico)

support of that community. That having been said, Mexico preferred a treaty, whose binding nature would give States greater security.

65. With respect to the wording of the proposed articles, he thought that the word "appreciable" should be deleted in article 4, paragraph 2. A watercourse State need not have suffered "appreciable" harm to be entitled to participate in the negotiation of any agreement on the matter. In the view of Mexico, the very existence of harm was enough to entitle the injured State to participate in negotiations, at least as an observer, and to demand damages if applicable. Furthermore, the word "appreciable" should be deleted in every article where it appeared, since the Special Rapporteur's proposal to replace "appreciable" by "significant" would create more problems than it would solve.

66. Lastly, with respect to article 7, the redraft proposed by the Special Rapporteur lent itself to confusion. Allowing the use of an international watercourse to cause harm as long as it was not significant sidestepped the issue posed by the cumulative effect of instances of damage that individually were not "appreciable". To protect international watercourses effectively, that aspect should be taken into consideration.

The meeting rose at 5.05 p.m.